INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	2
Statement	2
Summary of Argument	5
Argument:	
I. Section 424 of the Revenue Act of 1928 requires that, as preliminary to recovery of a tax, a claimant establish to the satisfaction of the Commissioner of Internal Revenue that the tax was actually borne by the claimant	7
II. The statute is applicable to parts and accessories chiefly or principally used in connection with automobiles	14
III. The Circuit Court of Appeals had authority to review the judgment of the District Court	17
Conclusion	22
Appendix	23

CITATIONS

Cases:	
Allen v. *Cartan & Jeffrey Co.*, 7 F. (2d) 21	20
Bank of Waterproof v. *Fidelity & Deposit Co.*, 299 Fed. 478, certiorari denied, 266 U.S. 618	20
Dunsmuir v. *Scott*, 217 Fed. 200	20
Graham & Foster v. *Goodcell*, 282 U.S. 409	14
Griffin v. *Thompson*, 10 F. (2d) 127	20
Maryland Casualty Co. v. *Jones*, 279 U.S. 792	7, 20
Pennok Oil Co. v. *Roxana Petroleum Co.*, 289 Fed. 416	20
Perry v. *Wiggins*, 57 F. (2d) 622, certiorari denied, 287 U.S. 609	20
Reeside v. *Walker*, 11 Howard 271	13
Routzahn v. *Willard Storage Battery Co.*, 65 F. (2d) 89, No. 329, October Term, 1933	6, 8, 15
St. Louis v. *Western Union Telegraph Co.*, 148 U.S. 92	20
Societe Nouvelle D'Armement v. *Barnaby*, 246 Fed. 68	20
Stinson v. *Business Men's Accident Ass'n.*, 43 F. (2d) 312	20
United States v. *Jefferson Electric Manufacturing Co.*, No. 171, October Term, 1933	8, 9, 12, 13
United States v. *Pugh*, 99 U.S. 265	18
Universal Battery Co. v. *United States*, 281 U.S. 580	17

	Page
Constitution:	
Article I, Sec. 9	13
Fifth Amendment	12
Statutes:	
Revised Statutes:	
Section 649 (U.S.C., Title 28, Sec. 773)	23
Section 700 (U.S.C., Title 28, Sec. 875)	23
Revenue Act of 1921, c. 136, 42 Stat. 227, 291:	
Section 900	23
Revenue Act of 1924, c. 234, 43 Stat. 253:	
Section 600 (U.S.C., Title 26, Sec. 881)	24
Act of Feb. 28, 1927, c. 226, 44 Stat. 1250, 1254	12
Revenue Act of 1928, c. 852, 45 Stat. 791, 866:	
Section 424	25
Miscellaneous:	
Rules of the District Court of the United States for the District of Connecticut:	
Rule 20	30
Treasury Regulations 47 (Revised December, 1921):	
Article 14	26
Article 15	27
Article 16	27
Treasury Regulations 47 (Revised August, 1924):	
Article 15	28
Article 16	28

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER

v.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, District of Connecticut

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the District of Connecticut (R. 16–32) is reported in 58 F. (2d) 248.[1] The opinion of the Circuit Court of Appeals for the Second Circuit (R. 255–261) is reported in 63 F. (2d) 783.

[1] A preliminary opinion relating only to the jurisdiction of the District Court (R. 6–10) is reported in 58 F. (2d) 246.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1933 (R. 261–262). A petition for a rehearing was denied April 7, 1933 (R. 262). The petition for a writ of certiorari was filed June 22, 1933 (R. 263), and was granted October 9, 1933 (R. 262–263). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does Section 424 of the Revenue Act of 1928 require as a prerequisite to a suit for the recovery of automobile excise taxes that the Commissioner of Internal Revenue shall first determine that the manufacturer has himself borne the burden of the tax?

2. Are tire chains parts or accessories of automobiles within the meaning of Section 900 of the Revenue Act of 1921 and the applicable Regulations?

3. Did the court below have power to determine the sufficiency of the evidence to support the judgment of the trial court?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 23–29.

STATEMENT

This suit was brought to recover taxes paid by the petitioner as the manufacturer of tire chains such as are commonly used on the tires of automobiles. The respondent collected taxes from the peti-

tioner in the aggregate amount of $640,508.43 for the period July 1, 1922, to June 30, 1924, on the ground that the chains made by the petitioner were automobile accessories (R. 16).

By stipulation the case was tried by the court without a jury (R. 12, 51, 63). At the conclusion of the evidence the trial judge made his order, with written opinion (R. 16–32), from which the following recital of facts is summarized:

When the tax was laid, the petitioner reduced its sale price to customers by the amount of the tax and so stamped its invoices and bills as to indicate that of the amount charged to the customer 1/21 part was required by the sales tax here in question (R. 17). Thereafter the petitioner computed and paid the tax upon the basis of the price thus reduced. The customer paid the same aggregate amount that he had before. The trial judge concluded that as to the first taxable period (1922) the petitioner had sustained the burden of proving that it had itself borne the tax (R. 17), and that as to the other two taxable periods (1923 and 1924) in legal effect the tax was collected from the customers, but since the sales price did not change, it was wholly returned to them (R. 17–18).

The chains made by the petitioner were sold by it to jobbers and dealers, and the petitioner did not and could not know how many of the chains thus sold were eventually used or purchased for use on "non-taxable" vehicles (R. 18). The chains generally were advertised by the petitioner for use on

vehicles other than automobiles (R. 18). Chains were manufactured in many sizes, varying not only in the length of the side or rim chain, but also in the length of the cross chain, and heavier wire was used in the construction of the larger sizes (R. 18).

Forty-nine sizes of chains, which were designated as to size and amount of tax paid in respect thereof (listed in Schedule "A" annexed to the opinion (R. 32–36)), fitted at least one type of vehicle other than an automobile equally as well as any automobile, and they operated as effectively upon the one class of vehicle as upon the other (R. 19). Wholly without adaptation for the purpose these chains were interchangeable upon such vehicles of both classes as used tires of substantially the same size (R. 19). There was no differentiation, either of construction or of design, in the chains used on the tires of "non-taxable vehicles" from those used on tires of "taxable vehicles" (R. 19). In ordering chains the universal practice was to order by size only, without specifying what kind of vehicle the chain was intended for (R. 19).

The mechanical design of the petitioner's chains was embodied in patents issued as early as 1904 (R. 19). Chains were in use for automobiles and trucks before the internal combustion tractor came upon the market (R. 19). The number of "taxable vehicles" during the taxable years exceeded the number of "non-taxable motor vehicles" (R. 19).

The trial judge concluded that the sizes listed in Schedule "A" (mentioned above) were actually used on "non-taxable vehicles,"[2] and that all chains except those listed in such schedule "A" were designed and primarily adapted for use on taxable vehicles, "there being no evidence that they had any other use during such period" (R. 20). To the extent of the 49 sizes, a judgment for the petitioner was entered (R. 41, 54, 67).

On appeal, the Circuit Court of Appeals for the Second Circuit reversed the judgment of the District Court (R. 261).

SUMMARY OF ARGUMENT

I

Regardless of the applicability of Section 900 of the Revenue Act of 1921 (*infra*, p. 23), taxing automobile parts and accessories, Section 424 of the Revenue Act of 1928 (*infra*, p. 25) precludes recovery by this petitioner. That section forbids any refund unless it is established *to the satisfaction of the Commissioner of Internal Revenue* that the amount sought was not collected directly or indirectly from customers. We contend that this gave exclusive jurisdiction to the Commissioner to decide who bore the burden of the tax.

But if this Court should hold otherwise, the decision below must nevertheless be affirmed because

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[2] The record contains much testimony introduced by the petitioner at the trial directed to proof of use of chains on snowplows, tractors, fire apparatus, etc. (R. 72–227).

the trial court's finding that the petitioner bore the burden of the tax is wholly inconsistent with the fact that invoices and bills to customers stated that 20/21 of the gross amount represented the sale price of the article and 1/21 of that amount represented the excise tax. That being so, the finding that the petitioner bore the tax or returned it to its customers is entirely unsupported.

There is no merit in the taxpayer's contention that Section 424 of the Revenue Act of 1928 is unconstitutional. It deprives the taxpayer of nothing to which it is beneficially entitled.

II

The statute is applicable to parts and accessories chiefly or principally used in connection with automobiles. The question of the proper construction of Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924 (*infra*, pp. 23–24) is discussed in the Government's brief in *Routzahn* v. *Willard Storage Battery Co.*, No. 329, October Term, 1933, and that argument need not be repeated here. It may be summarized in the contention that neither the statute which taxed "parts or accessories," nor the regulations under that statute, were intended to require that the article be exclusively adapted for use on automobiles. The judgment of the District Court in this case, being based solely on the ground that the tire chains in question were "equally adapted" for use on non-

taxable vehicles, without giving any weight whatever to the chief use of the tire chains, was erroneous and was properly reversed by the court below.

III

The Circuit Court of Appeals had authority to review the judgment of the District Court. Whether the findings of the trial court be regarded as general or special, there still remained open for review the rulings made during the progress of the trial. There were several such rulings in this case which duly appear in the bill of exceptions. In particular, at the close of all the evidence, the respondent made a motion for judgment. The question whether the judgment was supported by any evidence was, therefore, open for review in the Circuit Court of Appeals. *Maryland Casualty Co.* v. *Jones,* 279 U.S. 792, 795. There were also numerous rulings on the admission and exclusion of evidence to which exceptions were taken. These rulings, appearing in the bill of exceptions, formed a proper basis for review in the court below.

ARGUMENT

I

SECTION 424 OF THE REVENUE ACT OF 1928 REQUIRES THAT, AS PRELIMINARY TO RECOVERY OF A TAX, A CLAIMANT ESTABLISH TO THE SATISFACTION OF THE COMMISSIONER OF INTERNAL REVENUE THAT THE TAX WAS ACTUALLY BORNE BY THE CLAIMANT

Regardless of the applicability of Section 900 of the Revenue Act of 1921 (*infra,* p. 23), Section 424 of the Revenue Act of 1928 (*infra,* p. 25) precludes

recovery by this petitioner. The court below did not consider whether Section 424 was thus controlling because of the view that it took of the applicability of Section 900.

Section 424 (a) (2) of the 1928 Act forbids the refund of automobile parts or accessories tax to a manufacturer unless—

> *It is established to the satisfaction of the Commissioner* that such amount * * * was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; * * *.[3] (Italics ours.)

We contend that by Section 424 (a) (2) the Commissioner is given exclusive jurisdiction to decide who paid the tax. Our position on this issue is discussed in the brief for the Government in *United States* v. *Jefferson Electric Mfg. Company*, now pending in this Court, No. 171, October Term, 1933, and we need not repeat the argument there made. The question is also before this Court in *Routzahn* v. *Willard Storage Battery Company*, No. 329, October Term, 1933, where the Circuit Court of Appeals for the Sixth Circuit held in effect that de-

[3] Section 424 prescribes three other situations in which such refunds may be made: (1) if pursuant to a judgment of a court in a suit instituted prior to April 30, 1928; (2) if the amount is an overpayment of tax on an article properly taxable; or (3) if the manufacturer has filed a bond to repay such portion of the refund as is not distributed to the purchasers of the articles.

termination by the Commissioner could follow a court decision as to the validity of the tax.

Even if the Commissioner's decision is not conclusive, we contend that the petitioner has not made the showing required by the statute. In its complaint in the District Court the petitioner alleged that the tax was not paid directly or indirectly by the purchaser of its chains; that the chains were sold to customers at a flat price with no amount for excise tax included; and that the petitioner did not increase the price of chains by the amount of the tax but itself absorbed the tax (R. 3).

The respondent moved to dismiss the complaint, relying upon Section 424 (R. 5–6). The District Court denied the motion in a memorandum decision (R. 6–10).

When the case had been tried on the merits the court found that as to the first taxable period the petitioner had sustained the burden of proof; with respect to the two other taxable periods involved it found that the petitioner had (R. 17–18)—

> reduced its sale prices by the amount of the tax and so stamped its invoices and bills as to indicate that of the amount charged to the customer 1/21 part was required by the sales tax in question.[4] Thereafter the plaintiff computed and paid the excise tax upon the

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[4] The fact is similar in the *Jefferson Electric* case, No. 171, *supra*.

> basis of the price thus reduced, thereby saving to itself the payment of a tax upon a tax—5 per cent on 5 per cent. The arrangement cost the customer nothing, as he paid in the aggregate just what he had paid before. Consequently the plaintiff did not thereby pass the economic burden of the tax to its purchasers. However, since under this arrangement the invoices indicated the 1/21 of the amount billed was for the tax, I am constrained to conclude that the balance, 20/21, was the *real sale price,* especially since the tax was thereafter paid on that basis. This requires the conclusion of fact that in legal effect the tax was collected from the purchaser. But in view of the fact that the sales prices in vogue prior to the inauguration of this arrangement were thereafter reduced by the amount of the tax, I find further that in so far as the tax was collected from purchasers, it was wholly returned to them. (Italics ours.)

Thus, by the petitioner's own statement on the invoices and bills and by the finding of the District Court, 20/21 of the purchase price was the "real sale price," especially since the tax was paid on that basis (R. 18). Furthermore, by taking 20/21 of the old price as the base for the excise tax the petitioner saved 5% of the tax, as is pointed out by the District Court.

Although it found these facts, the District Court concluded that "in legal effect" the tax was col-

lected from the purchaser, and that "in so far as the tax was collected from purchasers, it was wholly returned to them" (R. 18). This is apparently the whole basis of the trial court's conclusion that the tax was paid by the petitioner. We contend that it is plainly wrong.

The fact that sales prices in vogue prior to the inauguration of the arrangement described above did not change is certainly not enough. Competition within the industry with consequent falling of sales prices, decrease in manufacturing costs, or any one of many incidents of business, might induce or cause the manufacturer to keep the price paid by his customers for his product on a certain level. The fact that the price paid did not change might be evidence as to who bore the tax. But it is certainly not sufficient to overcome the other fact found here, namely, that the "real sale price" was 20/21 of what had formerly been the sale price, and 1/21, *which the customer was paying,* was on account of the tax.

We submit, therefore, that even if this Court shall hold that we are wrong in our primary contention that Section 424 confers exclusive jurisdiction of this fact question upon the Commissioner of Internal Revenue, nevertheless the finding in this case that the tax was returned to the customers is so unwarranted that the decision below should be affirmed by this Court.

The petitioner argues that if Section 424 be construed as a bar to the present suits, it contravenes the Fifth Amendment to the Constitution because the date specified in the section, April 30, 1928, is prior to the date of the enactment of the Revenue Act of 1928. But the petitioner overlooks the fact that Section 424 did not adversely affect its ability to secure the refunds, since at the time of the enactment of Section 424 its right to the refund had already been limited by the Act of February 28, 1927, c. 226, 44 Stat. 1250, 1254, and succeeding statutes embodying the same provisions. See p. 9 of the Government's brief in *United States* v. *Jefferson Electric Mfg. Co.*, No. 171, October Term, 1933. The date specified in Section 424—April 30, 1928—was therefore more than a year after the petitioner's right was first affected and plainly allowed the petitioner and other taxpayers a reasonable time for the bringing of suits after the enactment of the Act of February 28, 1927, *supra*. Moreover, the petitioner is in no position to complain that Section 424 barred suits from a date prior to its enactment, for all of the petitioner's suits were brought more than a year after the enactment of the Revenue Act of 1928 (R. 5, 48, 61).

If the petitioner's argument is an attack upon the constitutionality of the Act of February 28, 1927, *supra*, and the statutes succeeding it, the argument is, we submit, without merit. Those Acts were appropriation acts, and forbade the use of public money for refunds of taxes on automobile

parts and accessories, except upon the conditions therein prescribed. We are aware of no limitation upon the power of Congress to refuse to appropriate money. See *Reeside* v. *Walker*, 11 Howard 271, 291; Article I, Section 9, of the Constitution.

If the petitioner's attack is directed against the curtailment of the substantive right to the refunds, we think there was ample justification for the action of the Congress. As shown by the report of the Committee on Ways and Means with respect to Section 424 of the 1928 Act, Congress believed that in many cases refunds of taxes paid on automobile parts and accessories would unjustly enrich manufacturers who had not borne the burden of the taxes. House Report No. 2, 70th Congress, 1st Session, p. 27; printed at pp. 29–30 of the Government's brief in *United States* v. *Jefferson Electric Mfg. Co.*, No. 171, October Term, 1933. If a manufacturer had not borne the burden of the tax but had collected it directly from the consumer, then the manufacturer, if he obtained a refund, would be liable to the consumer in an action based on quasi-contract. Such actions, however, would rarely be brought, both because the individual consumers would rarely know the facts and because the amount due to each individual purchaser would rarely be enough to warrant a suit—although the amounts in the aggregate, as the cases now pending show, would be very large. The effect of the statute, therefore, was to deprive the taxpayer of its *legal* right to a refund if the taxpayer was not in fact

and in law *beneficially* entitled to it. Congress provided in substance that a refund should not be made if it would in effect be a windfall to the taxpayer.

Such a statute, we submit, was within the constitutional competence of Congress. It took away from the taxpayer nothing to which it was beneficially entitled. Congress may take away an existing right of a taxpayer to a refund in order to prevent an unjust and inequitable administration of the law, and this is true whether the suit is in form against the collector personally or is against the United States. *Graham & Foster* v. *Goodcell,* 282 U.S. 409.

II

THE STATUTE IS APPLICABLE TO PARTS AND ACCESSORIES CHIEFLY OR PRINCIPALLY USED IN CONNECTION WITH AUTOMOBILES

The District Court found from the "subordinate facts" that certain chains made by the petitioner "were not primarily adapted for use on taxable vehicles, but were equally adapted for use on non-taxable vehicles" (R. 19). The Circuit Court of Appeals held that this conclusion was based on an erroneous view of the law. It said (R. 259):

> We think such a conclusion ignores the chief or principal use as being determinative of the primary adaptation rule, referred to by the Supreme Court, and it also assumes evidence of untaxed resales for possible diverted uses, [is] sufficient to override the primary adaptation rule.

We submit that the court below correctly held that the chief or principal use should be determinative of the application of Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924 (*infra*, pp. 23–24) which imposed a tax on "parts or accessories" of automobiles.

This question is discussed in the Government's brief in *Routzahn* v. *Willard Storage Battery Co.*, No. 329, October Term, 1933, and that argument need not be repeated here. It may be summarized in the contention that neither the statute which taxed "parts or accessories," nor the regulations under that statute, were intended to require that the article be "exclusively adapted" for use on automobiles. The judgment of the District Court in this case, being based solely on the ground that the tire chains in question were "equally adapted" for use on nontaxable vehicles, without giving any weight whatever to the chief use of the tire chains, was erroneous and was properly reversed by the court below.

The record in this case contains a considerable volume of testimony showing the use of the petitioner's chains on tractors (R. 76, 105, 111, 113, 117, 135, 141), fire apparatus (R. 77, 86, 89–90, 141, 156), road machines (R. 77 101, 117, 141, 156), and snow machinery (R. 94–95, 97–98), and showing their interchangeability between various machines (R. 77–78, 123, 127–128, 130). But there was no evidence and no finding to show that such uses were more than incidental and occasional and repre-

sented more than a small part of the volume of the petitioner's sales. One witness for the petitioner testified that five to ten percent of the chains were used on vehicles other than automobiles (R. 151). There was testimony that the percentage of chains for tractor use was small, and that many more chains were in use on automobiles than on tractors (R. 162, 182, 192, 196). The use on fire apparatus was limited (R. 190). There was also evidence to show that chains were used on automobiles before they were used on tractors (R. 153, 164, 186).

If the chief use of an article is the proper factor in determining its primary adaptability, the evidence was plainly insufficient to support the District Court's judgment in favor of the taxpayer.

Apart from the evidence as to the chief use, the decision below is supported, we submit, by the fact that (R. 258):

> The patent rights secured from the United States clearly specify that the chains were adaptable for use on automobiles to prevent skidding. They were described as primarily useful for this purpose.

See Exhibits A, C, and E, admitted in evidence R. 145; Exhibit B, admitted in evidence, R. 81. It would seem almost obvious that an article manufactured under a patent granted because of its primary usefulness in connection with automobiles was an article primarily adapted for such use.

The court below also pointed out (R. 258) that if Congress had intended to exempt an accessory like

tire chains it would have said so in the statute, just as it did say specifically that tractors should not be subject to tax. Instead, it used generic words, which must be given a broad construction to effect the statutory purpose. As this Court said in *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583:

> Thus the scheme of taxation embodied in these provisions centers around the motor vehicles enumerated therein. Their sale is the principal thing that is taxed, and the sale of parts or accessories "for" such vehicles is taxed because the parts and accessories are within the same field with the vehicles and used to the same ends.

This conclusion, we submit, requires the affirmance of the judgment below.

III

THE CIRCUIT COURT OF APPEALS HAD AUTHORITY TO REVIEW THE JUDGMENT OF THE DISTRICT COURT

The petitioner asserts (Br. 25) that "The Circuit Court of Appeals overruled certain findings of fact of the district court and conclusions of law thereon, and substituted therefor its own findings of fact and conclusions of law." The petitioner contends (Br. 31) that what the Circuit Court of Appeals did was erroneous on the ground that there were no special findings of fact and that (Br. 32) "in the absence of special findings the general findings of the District Court are conclusive upon all

matters of fact and prevent any inquiry into the conclusions of law embodied therein, except the rulings made during the progress of the trial."

The present case was tried before the court without a jury, in accordance with a written stipulation (R. 12, 51, 63). The court filed an opinion (R. 16–32) in which it segregated the facts relating to the issue arising under Section 900 of the Revenue Act of 1921; and directly following this statement of the facts it stated its reasoning and conclusions on that branch of the case. Later, at the same term [5] and before any appeal to the Circuit Court of Appeals, the District Judge made an order directing that the findings of fact and conclusions of law set forth in the opinion "shall constitute Special Findings of Fact and Conclusions of Law" (R. 43, 56, 69).

In our brief in opposition (pp. 7–9) we have contended that the findings made by the District Judge were "special findings" and the cases cited by the petitioner have been distinguished. We do not repeat that argument here, because it seems to us to make little or no difference whether the findings be regarded as general or special. If the findings were special, the Circuit Court of Appeals had power to determine whether the ultimate conclusion was supported by the subordinate facts found. *Cf. United States* v. *Pugh*, 99 U.S. 265. The Circuit Court of Appeals concluded as a matter of law that

[5] See Rule 20 of the Rules of the District Court for the District of Connecticut (*infra*, p. 30).

the "chief use" of an article was the primary test of its taxability as a "part or accessory", and on this view of the law it had authority to decide that the subordinate facts found by the District Court did not support the judgment for the taxpayer.

But, whether the findings of the trial court are considered as general or special, there still remain open for review "the rulings made during the progress of the trial," as the petitioners themselves state (Br. 32). There were several such rulings in this case. During the trial, and at the close of all the evidence, the respondent made a motion for judgment (R. 227, 13, 51, 64). Among the grounds upon which this motion was based was the assertion that the evidence was not sufficient to show that the petitioner's chains "were not primarily adapted for use in connection with" automobiles (R. 14, 52, 64–65). Other grounds of the motion were closely related to this one and plainly raised the legal question of the sufficiency of the evidence to support a finding for the taxpayer. Thereafter, the court denied the respondent's motion for judgment and an exception was allowed which duly appears in the bill of exceptions (R. 228).[6] Under these circumstances, we submit, whether the findings be regarded as special or not, the question whether

[6] The respondent also presented proposed findings of fact and conclusions of law (R. 36–41, 51, 63), the filing of which is recorded in the bill of exceptions (R. 228). These requested rulings were denied by the entry of the judgment in favor of the taxpayer, and exceptions were duly allowed (R. 228).

the judgment was supported by any evidence was open for review in the Circuit Court of Appeals.[7] The question is plainly concluded by this Court's decision in *Maryland Casualty Co.* v. *Jones,* 279 U.S. 792. There, in a case tried before the court without a jury, the defendant made a motion for nonsuit. This Court held (p. 795–796) that—

> This presented a question of law which is reviewable—just as a motion by the plaintiff at the close of a trial without the intervention of a jury, for a declaration that he is entitled to judgment, presents a question of law which is reviewable by the appellate court.[8]

---

[7] The trial court's overruling of the motion for judgment and its refusal to adopt the respondent's requested conclusions of law were assigned as error in the Circuit Court of Appeals (R. 247). Contrary to the petitioner's statement (Br. 31), these assignments of error were set forth in full in the Government's brief in the Circuit Court of Appeals, and both the respondent's brief and its reply brief were devoted primarily to the contention that the evidence and findings showing that the chains were "equally adapted" for use on taxable and nontaxable motor vehicles were not sufficient to support the judgment for the taxpayer.

[8] Other cases to the same effect are *St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92, 96; *Dunsmuir* v. *Scott*, 217 Fed. 200 (C.C.A. 9th); *Societe Nouvelle D'Armement* v. *Barnaby*, 246 Fed. 68 (C.C.A. 9th); *Pennok Oil Co.* v. *Roxana Petroleum Co.*, 289 Fed. 416 (C.C.A. 8th); *Bank of Waterproof* v. *Fidelity & Deposit Co.*, 299 Fed. 478 (C.C.A. 5th), certiorari denied, 266 U.S. 618; *Allen* v. *Cartan & Jeffrey Co.*, 7 F. (2d) 21 (C.C.A. 8th); *Griffin* v. *Thompson*, 10 F. (2d) 127 (C.C.A. 5th); *Stinson* v. *Business Men's Accident Ass'n*, 43 F. (2d) 312 (C.C.A. 10th); *Perry* v. *Wiggins*, 57 F. (2d) 622 (C.C.A. 8th), certiorari denied, 287 U.S. 609.

Besides the rulings during the trial already referred to, there were numerous rulings on the admission and exclusion of evidence to which exceptions were taken. These exceptions were duly incorporated in the bill of exceptions, and many of these rulings were assigned as error (R. 229–254). One of these exceptions related to the District Court's refusal to allow a witness to answer a question put by Government counsel as to whether the chief use of chains was not in fact in connection with automobiles and trucks (R. 182). This ruling was assigned as error (Assignment of Error XXIII; R. 240). It seems obvious that this exception presented squarely the question of law which was the basis of the Circuit Court of Appeals' decision—whether the chief use of an article is a factor in determining its taxability as a "part or accessory."

This analysis of the record makes it plain, we submit, that the questions passed on by the Circuit Court of Appeals were properly before it, and that there is no merit in the petitioner's contention that the court below exceeded its authority in reversing the District Court. In reaching this conclusion, it is wholly immaterial whether the District Court's decision be regarded as based on special findings or on a general finding and conclusion in favor of the taxpayer.

CONCLUSION

The court below did not exceed its power in reversing the decision of the trial court, and its conclusion that the chief use of an article is a factor in determining its taxability as a "part or accessory" is sound. Even if the petitioner's chains were not subject to tax as parts or accessories, recovery is barred by Section 424 of the Revenue Act of 1928. The judgment below is correct and should be affirmed.

Respectfully submitted.

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NOVEMBER 1933.

APPENDIX

STATUTES AND OTHER AUTHORITIES INVOLVED

Revised Statutes:

> SEC. 649. Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. (U.S.C., Title 28, Sec. 773.)
>
> SEC. 700. When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. (U.S.C., Title 28, Sec. 875.)

Revenue Act of 1921, c. 136, 42 Stat. 227, 291:

> SEC. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following

percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivisions (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

* * * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 322:

SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. * * *

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold

on or in connection therewith or with the sale thereof), except tractors, 5 per centum. * * *

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. * * * (U.S.C., Title 26, Sec. 881.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 866:

SEC. 424. REFUND OF AUTOMOBILE ACCESSORIES TAX

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner

deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

* * * * *

Treasury Regulations 47, Revised December 1921:

ART. 14. *Tires, inner tubes, parts, and accessories sold to manufacturers.*—The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as "tires, inner tubes, parts, or accessories" and shall not be understood to embrace raw materials used in the manufacture of such articles.

* * * * *

Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or pro-

ducer, is subject to tax as a "part or accessory."

* * * * *

ART. 15. *Definition of parts.*—A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

* * * * *

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

ART. 16. *Definition of accessories.*—An "accessory" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

* * * * *

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connec-

tion with automobile trucks, automobile wagons, other automobiles, or motorcycles are not subject to tax as "parts" or "accessories." * * *

If any doubt exists as to the special adaptability of any article, the fact of its sale by the manufacturer to be used with an automobile, or to an automobile accessories dealer, would determine its taxability.

* * * * *

Treasury Regulations 47, Revised August 1924:

ART. 15. *Tires, inner tubes, parts and accessories sold to manufacturers.*—The tax of 2½ percent applies to *all* tires, inner tubes, parts, or accessories sold separately by the manufacturer thereof, unless the sale is made to a manufacturer who furnishes a certificate in the form provided in this article for the exemption of such sale. * * *

The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as "tires, inner tubes, parts, or accessories," and shall not be understood to embrace raw materials used in the manufacture of such articles.

* * * * *

ART. 16. *Parts or accessories—Definition of parts.*—A "part" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed or manufactured for the special purpose of being used as, or to improve, repair, or replace, a component part of any such vehicle, or article, and which by reason of some peculiar characteristic is not

such a commercial commodity as would ordinarily be sold for general use, or which is primarily adapted only for use as a component part of such vehicle or article.

Definition of accessories.—An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use.

* * * * *

Articles which have a general commercial use and which are not especially designed or peculiarly adapted for use in connection with automobile truck, automobile wagon, or other automobile chassis or bodies, or motorcycles, are not subject to tax as "parts or accessories." * * *.

Mere stock or commercial commodities such as bolts, nuts, washers, screws, etc., though used as components for taxable articles, are not "parts" within the meaning of subdivision (3) when sold separately. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motorcycles, primarily adapted for use on or in connection therewith are taxable when sold by the manufacturer thereof regardless of the purpose for which used.

Rules of the District Court of the United States for the District of Connecticut:

20. Extension of Terms

For the purpose of making and filing bills of exceptions and making any and all motions necessary to be made within the term at which any judgment or decree is entered, each term of this Court shall be, and hereby is, extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered, or judgment or decree entered.